

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

JAN 31 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2006-0262-PR
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
DONNELL THOMAS,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20022200

Honorable Kenneth Lee, Judge

REVIEW GRANTED; RELIEF DENIED

Donnell Thomas

Winslow
In Propria Persona

V Á S Q U E Z, Judge.

¶1 A jury found petitioner Donnell Thomas guilty of robbery, and the trial court sentenced him in May 2003 to an enhanced, 4.5-year prison term. Simultaneously, Thomas was sentenced in two other causes for two counts of armed robbery and an aggravated assault, and the trial court ordered the sentence in this case to be served concurrently with those sentences, the longest of which was twenty-one years. We affirmed Thomas's

conviction and sentence in this case in *State v. Thomas*, No. 2 CA-CR 2003-0154 (memorandum decision filed Sept. 1, 2004).

¶2 In April 2005, Thomas filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S.¹ The trial court appointed counsel who filed a notice of review pursuant to Rule 32.4(c)(2), stating that she had reviewed the record without finding any colorable post-conviction claim to raise. Pursuant to Rule 32.4(c)(2); *Lammie v. Barker*, 185 Ariz. 263, 264, 915 P.2d 662, 663 (1996); and *Montgomery v. Sheldon*, 181 Ariz. 256, 260, 889 P.2d 614, 618 (1995), *supp. op.*, 182 Ariz. 118, 893 P.2d 1281 (1995), the trial court allowed Thomas to file a petition for post-conviction relief pro se. The present petition for review arises from the trial court's dismissal of the petition Thomas filed in February 2006. We review a trial court's grant or denial of post-conviction relief for an abuse of the court's discretion, *State v. Morgan*, 204 Ariz. 166, ¶ 25, 61 P.3d 460, 467 (App. 2002), and we find no abuse here.

¶3 Thomas raised four issues below, all but one of them precluded because they could have been, or actually were, raised on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3). First, Thomas asserted the trial court improperly permitted the investigating officer, a Pima County sheriff's deputy, to be present throughout the pretrial suppression hearing in violation of Rule 9.3, Ariz. R. Crim. P., 16A A.R.S. The trial court noted Thomas had raised but then waived that issue on appeal by failing to argue it adequately. The trial court further noted

¹The supreme court denied Thomas's petition for review on March 16, 2005, and our mandate in the appeal was issued on April 5, 2005.

the issue was meritless in any event, as Rule 9.3(d) expressly permitted the deputy to be present as the state's investigator.

¶4 Thomas alleged two other, similarly precluded issues: first, that the trial court had erred by impermissibly using his prior 1970 conviction for the first-degree murder of a liquor store clerk to enhance his sentence in this case and, second, that the court had impermissibly allowed the state to amend the offense charged in the indictment from armed robbery to robbery, in violation of Rule 13.5, Ariz. R. Crim. P., 16A A.R.S. As the trial court noted, the propriety of using Thomas's murder conviction as an historical prior felony conviction for sentence-enhancement purposes was expressly resolved on appeal, and the matter of amending the charge against Thomas from the greater offense of armed robbery to the lesser offense of robbery was another issue he had tentatively raised but effectively abandoned by not developing his argument on appeal. Both issues, therefore, the trial court correctly ruled were precluded. *See* Ariz. R. Crim. P. 32.2(a)(3).

¶5 The remaining issue Thomas presented below was the allegation that his advisory counsel had been ineffective in advising him at the suppression hearing, in failing to challenge testimony presented to the grand jury, in "failing to investigate A[riz.] R. C[rim.] P. Rule 15 material to prepare for adv[er]sarial representation," and in allowing "substantive amendment" of the indictment to reduce the charged offense from armed robbery to robbery.

¶6 The trial court analyzed Thomas's ineffective assistance claims in detail, applying the two-pronged test for ineffective assistance of counsel set out in *Strickland v.*

Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064 (1984). For reasons explained fully in the court’s written minute entry, it found Thomas had not shown that counsel’s performance had fallen below an objective professional standard of care in any of the alleged instances of ineffectiveness nor had Thomas demonstrated any prejudice to his defense as a consequence of counsel’s acts or omissions. As a result, having satisfied neither element of the *Strickland* test, Thomas was not entitled to an evidentiary hearing nor to relief. Although we do not quote the trial court’s ruling in its entirety, we approve it, and we find no abuse of the court’s discretion in declining to hold an evidentiary hearing and instead dismissing the petition. *See Morgan*, 204 Ariz. 166, ¶ 25, 61 P.3d at 467.

¶7 The trial court sufficiently identified, adequately analyzed, and correctly resolved all of the issues Thomas presented. *See generally State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court has correctly ruled on issues raised “in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court[’s] rehashing the trial court’s correct ruling in a written decision”). Accordingly, although we grant the petition for review, we deny relief.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

JOHN PELANDER, Chief Judge

JOSEPH W. HOWARD, Presiding Judge